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ORIGINAL

NO. 84-1198

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

THE STATE OF TEXAS,

Petitioner

vs.

SANFORD JAMES McCULLOUGH,

Respondent

RESPONSE TO STATE'S PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS OF TEXAS

LAW OFFICES OF MANN & LANEY
600 Ash Street
Plainview, Texas 79073
(806) 293-2618

ATTORNEYS FOR RESPONDENT

STATEMENT OF INDIGENCY

Respondent would show, as is evidenced by his affidavit collaterally filed, that he is presently incarcerated within the Texas Department of Corrections at Huntsville, Texas, where he has remained since his second trial which was held in December of 1980. Respondent has no funds with which to hire counsel, counsel having been appointed to represent Respondent at both of the trials which resulted in the conviction forming the basis of the State's Petition for Writ of Certiorari and, counsel having been appointed to represent Respondent through the appellate process of the Courts of the State of Texas.

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STATEMENT OF THE CASE

Respondent was convicted of the first degree felony offense of murder in September, 1980. That trial was to a jury who decided not only the guilt of Respondent, but also assessed punishment at 20 years' confinement. At his first trial, Respondent had filed, as is his prerogative under Texas law, a

written request asking that the jury assess punishment in the event of a conviction. Such procedure is allowed pursuant to Article 37.07, Texas Code of Criminal Procedure. Subsequent to this conviction and sentence, Respondent filed a Motion for New Trial asking that the conviction and sentence be set aside. The prosecutor agreed with Respondent that a new trial should be granted. (The Court of Appeals for the Seventh Supreme Judicial District of Texas, upon a reading of the entire record, noted as was in fact the case, that the State was apparently unhappy because only 20 years was assessed. See Appendix "A", page 4 of Petitioner's Petition for Writ of Certiorari.) The trial court, as was later reflected by Finding No. 3 in the document entitled "Order in Response to the Defendant's Motion for Findings of Fact", acknowledged that the punishment was insufficient in the opinion of the trial court.

Subsequent to the second trial which was held in December, 1980, the trial judge assessed the 50 year sentence presently in question. Respondent successfully sought a reformation and reduction of the sentence to a like punishment as was meted out upon the first conviction. This case has been reviewed by the intermediate Court of Appeals for the Seventh Supreme Judicial District of Texas sitting at Amarillo, Texas, as well as the Court of Criminal Appeals at Austin, Texas, the highest

court within the jurisdictional framework of the State of Texas to which a criminal case may be appealed.

RESPONSE TO REASONS FOR GRANTING WRIT

I.

THE CONCEPT OF GUARDING AGAINST THE POSSIBILITY OF JUDICIAL VINDICTIVENESS UNDER THE HOLDING OF THIS HONORABLE COURT IN NORTH CAROLINA V. PEARCE, 395 U.S. 711, WAS NOT REBUTTED BY THE RATIONALE OF THIS COURT IN WASMAN V. UNITED STATES, 468 U.S. ____, AND THE TEXAS COURT OF CRIMINAL APPEALS APPLIED APPROPRIATE DISTINCTIONS BETWEEN PEARCE AND WASMAN SO AS TO ARRIVE AT THE RIGHT RESULT IN DISPOSING OF RESPONDENT'S APPEAL BELOW.

In Respondent's initial appeal from his second conviction and harsher sentence, he took the position before the intermediate Court of Appeals for the State of Texas that North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L.Ed.2d 656 (1969), controlled the issue of whether the trial court had the authority to impose a harsher sentence. The Court of Appeals agreed with Respondent's position, pointing out that the State was apparently unhappy with the 20 year sentence handed down by the jury in the first trial, and the Court gave literal interpretation to Pearce so as to assure an absence of vindictiveness on the part of the judiciary because of Respondent's exercise of initiating his

appellate rights by filing a Motion for New Trial. The Amarillo Court of Appeals pointed out that this case was not the first time this question had been presented to an appellate Texas court by noting that in the case of The State of Texas v. Miller, 472 S.W.2d 269 (Tex. Cr. App. 1971) the highest appellate court for criminal matters in Texas had held, in a situation where a jury had imposed the first punishment and the judge a harsher second punishment, that the trial court was without authority to impose a harsher punishment unless the required justification explained in Pearce was present.

Discussing whether or not the trial judge's purported findings upon which she based the harsher sentence satisfied the requirements of Pearce, the Amarillo, Texas intermediate Court of Appeals noted that there was no "objective information" in the record which affirmatively established sufficient reason for a harsher judicially imposed sentence than was meted out by the jury in the first trial. Accordingly, the Amarillo, Texas Court of Appeals overruled the State's Motion for Rehearing.

The State then filed a Petition for Discretionary Review to the Court of Criminal Appeals for Texas, the highest court having appellate authority in criminal matters. The initial consideration by the Court of Criminal Appeals dealt with the limited question of whether the intermediate appellate court had had the right to reform the sentence or merely remand the case to

the trial court for appropriate action consistent with the opinion of the appellate court. The Court of Criminal Appeals, therefore, tacitly approved the action of the Court of Appeals in Amarillo by refusing to write on the sufficiency of the record so as to allow an increased punishment by the judge at the second trial or the applicability of Pearce in general. The State, not satisfied, filed a Motion for Rehearing with the Court of Criminal Appeals, limiting its question to whether the doctrine of Pearce applies in a limited circumstance where a jury assesses a first punishment and the same trial judge assesses punishment in a second trial.

The Court of Criminal Appeals at Austin, Texas, relying upon the due process clause of the Fourteenth Amendment to the United States Constitution, and relying upon Pearce, noted as did this Honorable Court earlier, that ". . .the existence of a retaliatory motivation would, of course, be extremely difficult to prove in any individual case." Thus, the very heart of the issue was exposed clearly by the Court of Criminal Appeals of Texas, pointing out that the doctrine and logic of Pearce was realistic and fair and necessary.

Noting that the State did not attempt to present the question of whether or not the findings of the trial judge justified the harsher subsequent sentence, the Court of Criminal Appeals reminded us that Article 37.07, Section 2(b), Texas Code of Criminal Procedure affords a defendant the right to have a jury

assess punishment on retrial. Carrying out the spirit of Pearce, the Court of Criminal Appeals pointed out that the right of a defendant in Texas to select a judge as opposed to a jury, or vice versa, for the imposition of punishment, was a right which was granted by the legislature and correctly noted that as long as such a right was created by statute, any defendant should be allowed to make the choice guaranteed by that statutory right without fear of vindictiveness.

The Court of Criminal Appeals of Texas did not decide the manner of applicability of Pearce within the confines of the jurisdiction of Texas and the enforcement of the Penal Code and the Code of Criminal Procedure of the State of Texas without considering the case primarily relied upon by the State in this Petition for Writ of Certiorari, Wasman v. United States, 468 U.S. ____, 82 L.Ed.2d 424, 104 S.Ct. 3217 (1984). The Court of Criminal Appeals of Texas pointed out that dicta in Chief Justice Burger's plurality opinion of Wasman indicated that it is only actual vindictiveness which is to be guarded against. The Court of Criminal Appeals further pointed out that the concurring justices, in their opinions in Wasman, seemed to rest their decisions upon the sound and realistic logic of Pearce to the effect that not only is actual vindictiveness to be guarded against, but also a fear of vindictiveness.

To guard against actual vindictiveness is no more important than to guard against the fear or apprehension of

vindictiveness for if either is present, a defendant is going to be impeded in the exercise of appellate rights. Whether the guarantee of those rights comes from the Constitution of the United States, Federal statute, state constitutions or some state statute such as Article 37.07, Texas Code of Criminal Procedure, makes no difference. If a sovereign affords a right, then the citizenry should have freedom and ease in claiming and exercising such a right. To limit the Pearce rationale to situations of actual vindictiveness would be to impose restraints upon the free will of a citizen who, in fact, could probably not overcome, by an actual showing of vindictiveness, the protection and sanctity afforded the judiciary.

There was another distinction between the case at bar and Wasman inasmuch as the defendant in Wasman went before the sentencing judge after the second trial with an intervening conviction on his record. Such was not the situation in the case at bar.

II.

APPLICATION BY THE TEXAS COURTS OF THE PEARCE RULE IN CIRCUMSTANCES WHERE A JURY HAS ASSESSED PUNISHMENT AT THE FIRST TRIAL AND A JUDGE IS CALLED UPON TO ASSESS PUNISHMENT IN A SUBSEQUENT TRIAL DOES NOT DENY THE TRIAL JUDGE DISCRETION WITH REGARD TO SENTENCING.

It is conceded that in the absence of an intervening conviction, as was the case of Wasman, or in the absence of other objective, identifiable conduct on the part of the accused as required in Pearce, the trial judge is going to be limited to a punishment that was imposed by the fact finder of the first trial. A balancing test must be applied, however. The law must strike a balance between the interests of judiciary in imposing "individual" standards of one particular judge and the vice sought to be avoided by Pearce, i.e. a free and unfettered exercise of all, not just some, rights afforded an accused citizen. As pointed out earlier, if a state statute such as Article 37.07, Texas Code of Criminal Procedure affords an accused an additional right or greater rights than does some other jurisdiction, then that state's statutory right afforded the accused must be enforced in favor of that accused. Due process of law and fundamental fairness require and would allow no less.

If the State's concern with judicial hand-tying is of sufficient concern to warrant a change from the established practice within the State of Texas, then the legislature of the State is the appropriate body to make such a change. The issue in question is really one of "state's rights" and an issue which could best be determined by the workings of government within the confines of the borders of this State. There is no claim made that the present system denies any citizen of due process of law. In fact, it is the position of the Respondent that the present statutory scheme in Texas and the law of this state, as evidenced by the intermediate Court of Appeals and the Court of Criminal Appeals in Texas has assured the Respondent of due process of law and fundamental fairness. Moreover, if this Honorable Court were to intervene and establish a rule which is sought by the State, and were such rule to be applied retroactively, the Respondent would be very muchly denied due process of law and fundamental fairness as well as being denied equal protection under the law.

North Carolina v. Pearce, was unquestionably the law at the time Respondent exercised his initial appellate rights by filing a Motion for New Trial. To now deny the Respondent the benefit of the Doctrine of Stare Decisis and the privileges and freedoms under Pearce would be an unfair changing of the rules.

III.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT FORMS SUFFICIENT FOUNDATION FOR A REBUTABLE PRESUMPTION OF JUDICIAL VINDICTIVENESS IN ALL CASES OF RETRIAL AND SUBSEQUENT PUNISHMENT ASSESSMENTS, WHETHER BY JUDGE OR JURY.

So as to actually and realistically afford due process to a citizen facing sentencing after a second conviction for the same offense, the law should balance between the judiciary's right to impose punishment on the one hand and the rights of the citizen to avail himself of all rights surrounding his experience within the criminal justice system.

It is again respectfully pointed out that the opinion in Wasman was a plurality opinion not interpreted by this writer to limit the Pearce rationale to situations of actual vindictiveness. Actual vindictiveness, fear of vindictiveness -- it makes no difference; the end result is still the same. To limit the Pearce rationale to situations where actual vindictiveness could be proven is to, in a purportedly respectable way, overrule Pearce in its entirety [illegible] require the unrealistic.

CONCLUSION AND PRAYER

Respondent believes that the legal precedents and arguments applicable to the issues in this case were considered by and decided appropriately by the appellate courts of the State of Texas as those courts applied their own statutes. The decisions, therefore, of the Texas appellate courts must be allowed to stand and procedural changes, if they are needed, made by the jurisdiction involved, the State of Texas, through legislative process.

In the event this Honorable Court decides to apply the rationale of North Carolina v. Pearce in a manner differently from the two appellate courts of the State of Texas, then such application should be made prospectively only so as not to be fundamentally unfair to the Respondent who relied upon the state of the law as it existed at the time that he exercised his appellate rights which led to a sentence two and one-half times more severe than his first sentence.

Respectfully submitted,

LAW OFFICES OF MANN & LANEY
600 Ash Street
Plainview, Texas 79073
(806) 293-2618

By _____
Mark Laney
SBN 11892500

ATTORNEYS FOR THE RESPONDENT

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and correct copy of the foregoing Response to State's Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas has this the 10 day of April, 1985, been furnished to the Mr. Deane C. Watson, Assistant Criminal District Attorney, Associate, Appellate Section, Randall County Courthouse, Canyon, Texas 79015.

_____
Mark Laney